NO. 1046

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NICH GURVICH,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

LORENZO S. B. SAWYER,

MALONY & COBB,

Attorneys for Plaintiff in Error.

MAY 1

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Lorenzo S. B. Sawyer,
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STATEMENT OF THE CASE.

The plaintiff in error was indited at the regular December 1903 term of the District Court for Alaska Division No.1, for "Knowingly, willfully and unlawfully, after having obtained a license to retail liquors at Douglas, within the District aforesaid and while holding bar-room license No. 93, ~~Division No.1~~, sell, give and dispose of certain intoxicating liquors to certain minors" etc. The indictment purported to be drawn under Section 466 of the Alaska Penal Code, (Rec. p. 1), but the lower court held that the offense charged was denounced by Section 478, (Rec. p 39), which provides that "No licensee in any public place shall knowingly sell or permit to be sold in his establishment any intoxicating liquors of any kind to any person under the age of 21 years" under penalty of having his license revoked and the money paid therefor forfeited. (Alaska Code Part 2 Sec. 478.)

The defendant was put on trial before a jury of six men who returned a verdict of guilty as charged. Motions for a new trial and in arrest of judgment were filed and overruled and on February 24th, 1904, judgment and sentence were pronounced. (Rec. p. 7 - 8). A bill of exceptions was served, a writ of error sued out, errors assigned and the cause is now here for review.

There are five errors assigned, but the questions raised are only two:

First: Can a defendant be convicted of crime under the authority of the United States before a jury composed of only six men?

Second: Can a defendant be legally convicted of "knowingly, willfully and unlawfully" selling liquor to minors, when the facts show that such sales were made by his employees without his knowledge or consent and in violation of his orders?

The first question is raised by the

FIRST AND SECOND ASSIGNMENTS OF ERRORS.

The bill of exceptions shows that when six jurors had been examined, tried and accepted as jurors by both parties the court ordered said six jurors to be sworn as the jury to try the cause. The defendant thereupon objected to being placed upon trial before a jury composed of only six jurors on the ground that same was not a legal jury and demanded a jury of twelve; but the court overruled said objection and compelled the defendant to go to trial before a jury composed of only six jurors, to which ruling the defendant then and there accepted.—Rec. p.19 and20. The motion in arrest of judgment—Rec, p. 46--was based upon the ground that the verdict was illegal and void, in that it was rendered by a jury composed of only six jurors.

ARGUMENT.

It is true that the Alaska Code, Part 2, Sec. 171, provides that trials of misdemeanors shall be before a jury composed of six. But we respectfully submit that such statute is unconsti-

tutional and void. The Constitution, Art 3 Sec. 2, provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." The same right to trial by jury is again guaranteed by the sixth amendment. Thence arises two questions: First, is a jury of six a constitutional jury? And second, has the Congress the power to abrogate this constitutional guarantee in Alaska?

It is, we think, too well settled to require extended argument that the "jury" guaranteed in the Constitution means a jury of twelve, neither more nor less, such as was understood at the common law.

Cooley's ~~Common Law~~, 391

1 Bishop's Criminal Proc., Sec. 764, 768, 773, 774, 779 and 781.

Thompson vs. Utah, 170 U. S. 343.

Many other authorities might be cited but we deem it unnecessary.

Can Congress then abrogate this rule in a Territory of the United States? The Supreme Court in the Thompson case has answered this question emphatically in the negative. We quote from the opinion of Mr. Justice Harlan:

"That the provisions of the Constitution of the United States relating to the right of the trial by jury in suits at common law apply to the territories of the United States is no longer an open question. Webster vs. Reid, 11 How. 437. 460; Publishing Co. vs. Fisher, 166 U. S. 464, 458, 17 Sup. Ct. Springville City vs. Thomas, 166 U. S. 707. 17 Supt. Ct. 717. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of Seprember 9. 1850 (9 Stat. 453 c 51, ¶6), to provide that the unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: 'In our opinion the seventh

amendment secured unanimity in finding a verdict as an essential of feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.

'It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

"The judgment of this Court in the Reynolds vs the U.S. 98 U.S. 145. 154. which was a criminal prosecution in the territory of Utah, assumed that the sixth amendment applied to criminal prosecutions in that territory.

"In Callan vs Wilson, 127 U. S. 540, 548, 551, 8 Sup. Ct. 1301, which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the constitution as well as by the fifth and sixth amendments. The contention of the government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state 'the trial shall be at such place or places as the Congress may by law have directed', had, probably, reference only to offences committed on the high seas; that in adopting the sixth amendment the people of the states were solicitous about trial by jury in the states, and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be hereinafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dockyards; and, consequently, that that amendment should be deemed to have superceded so much of the third article of the constitution as related to the trial of crimes by jury. That con-

tention was overruled, this Court saying: 'As the guarantee of a trial by jury, in the third article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those permananptly or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution or of the original amendments to justify the assertion that the people of the District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property, especially of the privilege of trial by jury in criminal cases. We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.

"In the late Corporation of the Church of Jesus Christ of the Latter Day Saints vs U. S 136, U. S. 1, 44. 10 Sup. Ct. 792, one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court. in one of which—National Bank vs. County of Yankton, 101 U. S. 129, 133--it was said that Congress, in virtue of the sovereignity of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial leg-

islatures valid, and a valid act void; that it had full and complete legislature authority over the people of the territories and all the departments of the territorial governments; that it ,'may do for the territories what the people, under the constitution of the United States, may do for the states." Reference was also made to Murphey vs Ramsey, 114 U. S. 15, 44 5 Sup. Ct. 747, to which it was said: "The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the Court in late Corporation of the Church of Jesus of Latter Day Saints vs U. S. then proceeded: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial legislature established therein is generally expressly reserved in the organic acts establishing government in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved Sept. 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if dissap

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proved shall be null and of no effect.' 9 Stat. 454.

"Assuming, then, that the provisions of the constitution relating to trial for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale P. C. 161, 1 Chit. Cr. law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., but by the judgment of his peers or by the law of the land, it referred to a trial of twelve persons. Those who emigrated to this country from England brought with them this great privilege, as their birthright and inheritance, as a part of that admirable common law which has fenced around and interposed barriers on every side against the approaches of arbitrary power' 2 Story, Censt. 1779. In Bac. Abr. title "Juries" it is said; "The trial per pais, or by a jury of one's country is justly esteemed one of the principal excellences of our constitution; for what greater security can any person have in his life, liberty or estate than to be sure of not being divested of nor injured in any of these without the sense and verdict of 12 honest and impartial men of his neighborhood? And hence we find the common law confirmed by Magna Charta." So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses vive voce in the presence of the judge and and jury and by the inspection and direction of the judge.' It must consequently be taken that the word "Jury" and the words "Trial by jury" were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the

adoption of that instrument: and that when Thompson committed the offence of grand larceny in the territory of Utah —which was under the complete jurisdiction of the United States for all purposes of government and legislation--the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

The second question is raised by the Third, Fourth and Fifth assignments of error, which are as follows:

Third—The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed, or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

Fourth—The Court erred in instructing the jury as follows:

"This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell, to the person described. Permit, is defined by Webster in the following language: 'To let through; to allow or suffer to be done, to tolerate or put up with.' One may permit by giving express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated and may knowingly do so when under obligation of law to prevent the act and takes no

adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by the law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

Fifth—The court erred in instructing the jury as follows; "It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The court charges you that when the bar-keepers of the defendent were selling liquor to minors and others they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian Saloon after the license was granted were sales either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away of intoxicants was unlawful and the act of the bar-keeper, the agent, was the act of the principal and in my opinion under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

The bill of exceptions shows that the prosecution introduced testimony tending to show that the defendant was the proprietor of the saloon run under the license charged in in the indictment; that the sales to the minors charged were made by his bar keepers (Rec. p 20). It was not claimed or attempted to be shown that the defendant himself sold to minors, and the court so told the jury (Rec. p. 41).

The defendant himself testified, and was not contradicted, that he had no knowledge that the sales were made to minors, until after they were made; that when he heard of